APPENDIX A — ORDER AMENDING OPINION AND DENYING PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC AND AMENDED OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED JULY 8, 2002

No. 01-15449

D.C. No. CV-00-01081-WBS

TRANSMISSION AGENCY OF NORTHERN CALIFORNIA,

Plaintiff-Appellant,

v.

SIERRA PACIFIC POWER COMPANY, BONNEVILLE POWER ADMINISTRATION, PACIFICORP, and PORTLAND GENERAL ELECTRIC,

Defendants-Appellees.

ORDER AMENDING OPINION AND DENYING PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC AND AMENDED OPINION

Appeal from the United States District Court
for the Eastern District of California
William B. Shubb, District Judge, Presiding

Argued and Submitted
February 11, 2002 — San Francisco, California

Appendix A

Filed April 16, 2002
Amended July 8, 2002

Before: David R. Thompson, William A. Fletcher, and Marsha S. Berzon, Circuit Judges.

Opinion by Judge Thompson

OPINION

THOMPSON, Circuit Judge:

The Transmission Agency of Northern California (TANC) is a joint exercise of powers agency composed of over a dozen Northern and Central California municipalities. It brought suit against the Bonneville Power Administration (BPA), a federal power marketing agency of the United States Department of Energy,[1] and the defendant regional utility companies. TANC asserted claims for equitable relief and damages allegedly incurred as a result of the BPA and the other defendants constructing, and interconnecting with, an electricity intertie known as the Alturas Intertie.

The district court did not reach the merits of TANC's claims. It dismissed the claims against the BPA for lack of subject matter jurisdiction, concluding that those claims

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1. The BPA markets power from federal and nonfederal hydroelectric projects, with a primary service area that includes California, Oregon, and Nevada. The BPA's transmission lines constitute approximately 80% of the Pacific Northwest's bulk transmission capacity.

challenged final agency action by the BPA and fell within the Ninth Circuit Court of Appeals' exclusive original jurisdiction. *See* 16 U.S.C. § 839f(e)(5). It also dismissed, as preempted under the Federal Power Act, 16 U.S.C. §§ 791-828c, TANC's claims against the defendant utility companies. TANC appeals. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

I

Facts and Proceedings

Because this case comes before us on appeal from a dismissal under Federal Rule of Civil Procedure 12(b)(6), all facts alleged in TANC's complaint are taken as true and construed in the light most favorable to it. *Epstein v. Wash. Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1996).

TANC alleged that in 1991 it entered into an "Interim Interconnection Agreement" and "Schedule and Coordination Agreement" (collectively the "Agreements") with the defendants BPA, Portland General Electric, and PacifiCorp (collectively the "Northwest Parties") to jointly construct and operate an interconnection of two electricity interties. Under the Agreements, the Northwest Parties agreed to upgrade from 3200 MW to 4800 MW an existing intertie that they own in Oregon, known as the Northwest AC Intertie. TANC, in turn, agreed to construct a new 1600 MW line known as the California-Oregon Transmission Project. TANC also agreed to connect the California-Oregon Transmission Project to an already existing intertie in California, the 3200 MW Pacific

AC Intertie,[2] to form the 4800 MW California-Oregon Intertie. Finally, TANC and the Northwest Parties agreed to join the California-Oregon Intertie with the Northwest AC Intertie, creating a transfer capability of 4800 MW north-to-south at the California-Oregon Border between the two interties. The parties performed under the Agreements, and the Federal Energy Regulatory Commission (FERC) allocated to TANC's California-Oregon Transmission Project one-third of the newly-created transfer capability.

In 1996, the BPA announced its decision to join the Northwest AC Intertie with the new 300 MW Alturas Intertie, which was to be constructed by defendant Sierra Pacific. *See* Decision to Interconnect with Sierra Pacific Power Company's Alturas Transmission Line Project, 61 Fed. Reg. 7095 (Feb. 26, 1996). Sierra Pacific completed construction of the Alturas Intertie in late 1998.

The Alturas Intertie stretches from Nevada through northern California and into Oregon, where it connects with the Northwest AC Intertie. When operational, the Alturas Intertie causes a megawatt-for-megawatt reduction in the ability of the Northwest AC Intertie to deliver power to the California-Oregon Intertie. As a result, if the Alturas Intertie is operating at its maximum 300 MW capacity, then the California-Oregon Intertie has 300 MW of excess capacity.

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2. The Pacific AC Intertie is located south of the California-Oregon border and is owned by utilities not parties to this litigation. It was already connected to the Northwest AC Intertie, but that connection provided only 3200 MW of transfer capability.

Appendix A

Prior to the Alturas Intertie commencing operations, TANC (and other companies and instrumentalities not parties to this litigation) filed an unsuccessful protest with FERC, alleging that the Alturas Intertie would create a megawatt-for-megawatt reduction in the capacity of the California-Oregon Intertie. In that proceeding, TANC requested that FERC ensure that procedures were put in place to protect the "then-existing" contractual relationships, including the California-Oregon Intertie's alleged first-priority access to 4800 MW of transfer capability under the Agreements. Alternatively, TANC asked FERC to delay operation of the Alturas Intertie until either Congress approved the intertie, or the Northwest AC Intertie's capacity was increased to 5100 MW. FERC denied these requests and, on November 30, 1998, it approved operation of the Alturas Intertie. *See* 85 F.E.R.C. ¶ 61,314 (Nov. 30, 1998).

In February 1999, however, after operation of the Alturas Intertie had commenced, FERC initiated a hearing into the connection agreement creating the Alturas Intertie. FERC considered the hearing necessary to address allegations regarding the megawatt-for-megawatt reduction in the California Oregon Intertie's capacity, the inconsistency between the Alturas scheduling agreement and the California-Oregon Intertie's scheduling needs, and related issues.

Appendix A

Before the FERC case was resolved,[3] TANC filed the present lawsuit in December 1999 in California Superior Court against the BPA, Sierra Pacific, Portland General Electric, and PacifiCorp. As amended, TANC's complaint alleged breach of contract, tort, and property claims and requested legal and equitable relief. Specifically, TANC alleged that the reduction in capacity of transfers from the Northwest AC Intertie to the California-Oregon Intertie breached the Agreements and caused damage to the California-Oregon Transmission Project. TANC also asserted a fraud claim, alleging that Sierra Pacific had made misrepresentations before unspecified governmental agencies to obtain approval for the Alturas Intertie.

The BPA, a federal agency, exercised its right to remove the action to federal court, *see* 28 U.S.C. §§ 1442(a)(1), 1446(a), and the remaining defendants followed suit, asserting federal question and diversity jurisdiction. *See* 28 U.S.C. §§ 1331, 1332. Once in federal court, the defendants moved to dismiss under Federal Rules of Civil Procedure 12(b)(1),

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3. After the district court filed its opinion in this case, an administrative law judge released a decision in the ongoing FERC proceeding that is reported at *Sierra Pacific Power Co.*, 94 F.E.R.C. 63,019 (2001). Although that decision is still subject to further administrative and judicial review, and therefore not finally dispositive of any issue in the case, the existence of the ongoing litigation within FERC is an adjudicative fact relevant to this case. Federal Rules of Evidence 201(a), (b). Further, the existence of the opinion is not in dispute, nor are its contents. *Id.* Therefore, we take judicial notice of the entirety of 94 F.E.R.C. 63,019. *See* Fed. R. Evid. 201(c).This renders moot the parties' pending motions requesting that we take judicial notice of only select portions of that decision.

12(b)(6), and 19(b). TANC then voluntarily dismissed its tort claims against the BPA and its claims for equitable relief. The district court dismissed the remainder of TANC's claims under Rules 12(b)(1) and 12(b)(6). The court held that the claims against the BPA were subject to the exclusive original jurisdiction of this court under 16 U.S.C. § 839f(e)(5), and that TANC's claims against Sierra Pacific, PacifiCorp, and Portland General Electric were preempted by the Federal Power Act. This appeal followed.

II

Claims Against BPA

TANC raises two challenges to the district court's dismissal of its claims against the BPA. TANC contends that (1) the district court erred in holding that its claims were challenges to final agency action by the BPA and thus within the exclusive original jurisdiction of the Ninth Circuit Court of Appeals, and (2) even if the district court was correct that it lacked jurisdiction, instead of dismissing the claims, it should have transferred them under 28 U.S.C. § 1631 from the district court to this court or, alternatively, to the Court of Federal Claims. We are unpersuaded by TANC's arguments, and affirm the decision of the district court.

A

The district court ruled that it lacked subject matter jurisdiction over TANC's claims against the BPA because those claims were challenges to final agency action by the BPA over which this court has exclusive original jurisdiction under

section 9(e)(5) of the Northwest Power Planning Act, codified at 16 U.S.C. § 839f(e)(5). We review de novo the district court's conclusion that it lacks subject matter jurisdiction. *Wilson v. A.H. Belo Corp.*, 87 F.3d 393, 396 (9th Cir. 1996).

Section 9(e)(5) of the Northwest Power Planning Act provides:

> Suits to challenge . . . final actions and decisions taken pursuant to this Act by the [Bonneville Power] Administrator or the Council, or the implementation of such final actions, whether brought pursuant to this Act [or] the Bonneville Project Act . . . shall be filed in the United States court of appeals for the region. [Once the time for such challenges has passed,] [t]he plan and program, as finally adopted or portions thereof, or amendments thereto, shall not thereafter be reviewable as a part of any other action under this Act or any other law. Suits challenging any other actions under this Act shall be filed in the appropriate court.

TANC's remaining claims against the BPA are for breach of contract and inverse condemnation. TANC argues that these claims do not fall within this court's exclusive original jurisdiction because the claims are not challenges to any final administrative decision — an argument made with particular reference to the district court's decision that the claims against the BPA were ultimately challenges to the BPA's decision to join in the construction and operation of the Alturas Intertie. Rather, TANC argues, its claims fall under

the final sentence of section 9(e)(5) quoted above, establishing jurisdiction over any other claims in the appropriate court. We disagree.

"We have consistently interpreted [the section 9(e)(5)] judicial review provision 'with a broad view of this Court's jurisdiction and a narrow definition of district court jurisdiction.' " *Cent. Mont. Elec. Power Coop., Inc. v. Adm'r*, 840 F.2d 1472, 1475 (9th Cir. 1988) (quoting *Pacific Power and Light v. Bonneville Power Admin.*, 795 F.2d 810, 814 (9th Cir. 1986)). In evaluating whether jurisdiction exists under section 9(e)(5), TANC's particular legal theories of breach of contract and inverse condemnation are not controlling. "It matters not that the [plaintiffs] attempt to base their theory of recovery in part outside of the Northwest Power Planning Act. In examining the nature of the agency action being challenged, our focus is 'on the agency being attacked and whether the factual basis for the attack is an agency action authorized by the Act.' " *Cent. Mont. Elec. Power*, 840 F.2d at 1476 (quoting *Pacific Power*, 795 F.2d at 816); *accord Forelaws on Bd. v. Johnson*, 709 F.2d 1310, 1313 (9th Cir. 1983).

In *Pacific Power*, we held that we had exclusive jurisdiction where declaratory relief against proposed agency rate-making was sought, even though the plaintiffs argued that they sought to challenge only the fact that the BPA's new rates breached prior contractual commitments. *Pacific Power*, 795 F.2d. at 815. We explained that "[a]lthough the utilities' action is based upon their contracts with BPA, the effect of their action would be to challenge BPA's ratemaking proceedings and the agency's obligation to undertake ratemaking in a manner consistent with its contractual commitments." *Id.* at 815-16.

Similarly, in *Central Montana Electric Power*, we rejected the argument of the plaintiff electrical cooperatives that we lacked exclusive original jurisdiction over a claim to a share of electric power because a portion of that claim rested on law and facts outside of the Northwest Power Planning Act. We explained that ultimately, "[t]he nature of the agency action being challenged by the Cooperatives [was] the Administrator's final action as to the marketing and allocation of electric power, a function that is governed extensively by the Northwest Power Planning Act. . . . Accordingly, the action is subject to our exclusive jurisdiction. . . ." *Cent. Mont. Elec. Power*, 840 F.2d at 1476 (citations omitted).

TANC's basic argument is that it is only challenging the BPA's failure to maintain 4800 MW of transfer capability between the Northwest AC Intertie and the California-Oregon Intertie. TANC contends this deprived it of electricity capacity for the California-Oregon Transmission Project[4] and violated the Agreements. TANC argues that it is irrelevant whether construction of the Alturas Intertie contributed to the deprivation and breach, because the BPA could have chosen to increase the overall capacity of the Northwest AC Intertie to 5100 MW and did not.

TANC relies upon *Public Utility District Number 1 v. Johnson*, 855 F.2d 647 (9th Cir. 1988). There, the petitioner challenged several BPA actions, but it also alleged a breach

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4. We assume, without deciding, that a deprivation of electricity might support a claim for inverse condemnation under California law. *Cf. Harding v. State of Cal. ex rel. Dept. of Transp.*, 159 Cal. App. 3d 359, 364-67 (1984) (holding that a deprivation of light can support an inverse condemnation claim).

of contract claim based upon an oral contract it entered into with the BPA. We held that we lacked original jurisdiction over the breach of contract claim because "claims involving alleged contractual breaches by the agency and based on allegations of facts outside an administrative record must be heard in the claims court. . . . " *Id.* at 650. We distinguished previous breach of contract cases that reached a contrary result because in those cases the claims ultimately challenged final agency action by the BPA pursuant to its statutory authority. *Id.* at 649-50 (distinguishing *Pacific Power*, 795 F.2d. at 816). We explained: "In this case, however, the principal conduct of the agency on which petitioner's claim is based *is not final action taken pursuant to statutory authority*; it is alleged contractual commitments made outside the scope of any administrative record, and which petitioners contend have been breached." *Public Utility District Number 1*, 855 F.2d at 650 (emphasis added). Original jurisdiction over that case, therefore, lay in the claims court. *Id.* at 650-51.

Unlike the petitioner's claim in *Public Utility District Number 1*, TANC's inverse condemnation and breach of contract claims cannot be separated out from the BPA's final administrative decision.[5] In deciding to join the Northwest

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5. The parties devote much discussion to the administrative record component of the *Public Utility District Number 1* decision, as opposed to our holding that the oral contract claim was not a challenge to any final administrative decision. This is a plausible reading of *Public Utility District Number 1*, but not an accurate one. The key test under section 9(e)(5) is whether there is a challenge to a final administrative decision or its implementation, not the existence or adequacy of an administrative record. *See Cent. Mont. Elec. Power*,

(Cont'd)

AC Intertie with the Alturas Intertie without also making provision to increase the capacity of the Northwest AC Intertie, the BPA plainly decided to take an action that would deprive TANC of transmission capacity and that was inconsistent with the BPA's alleged contractual commitments to TANC. At that time, TANC could have filed a petition in this court under section 9(e)(5) to challenge the BPA's decision on these grounds. TANC did not file such a petition. It cannot raise the issue at this late date by clothing its challenge in state law claims. The root cause of the alleged inverse condemnation and breach of contract was the BPA's decision to join the Northwest AC Intertie to the Alturas Intertie, a final decision under section 9(e)(5) of the Northwest Power Planning Act. We alone have original jurisdiction over a challenge to that decision. *Cf. Pacific Power*, 795 F.2d at 815-16.

B

TANC requests that if we hold that the district court lacked jurisdiction over its claims against the BPA, we transfer those claims to this court. Under 28 U.S.C. § 1631, a federal court may transfer an action over which it lacks jurisdiction to another court that has jurisdiction. The district court denied this request, and so do we.

(Cont'd)

840 F.2d at 1476; *see also Puget Sound Energy, Inc. v. United States*, 47 Fed. Cl. 506, 512 (Fed. Ct. 2000). This is especially true where, as here, the asserted inadequacy of an administrative record regarding a key issue was caused by the plaintiff's failure to raise that issue in response to an administrative decision that clearly implicated the issue.

A transfer under § 1631 is inappropriate if the action would have been untimely had it been filed in the appropriate court. *Abbott v. United States*, 144 F.3d 1, 6 (1st Cir. 1998). Section 9(e)(5) of the Northwest Power Planning Act requires that suits challenging a final BPA action, or its implementation, be filed within ninety days of the BPA giving notice of the action in the Federal Register or of the action becoming final. 16 U.S.C. § 839f(e)(5). Here, the BPA announced its decision to interconnect the Northwest AC Intertie to the Alturas Intertie in February 1996. TANC's complaint was not filed until December 1999. Therefore, TANC's action challenging the BPA's final decision is untimely and transfer to this court is precluded. The district court correctly dismissed TANC's claims against the BPA for lack of subject matter jurisdiction.[6]

III

Claims Against The Utility Company Defendants

TANC also appeals the district court's dismissal, under Federal Rule of Civil Procedure 12(b)(6), of TANC's claims against the utility company defendants, Sierra Pacific, PacifiCorp, and Portland General Electric. The district court held that these claims were preempted by the Federal Power Act, 16 U.S.C. §§ 791-828c. "We review de novo both a dismissal for failure to state a claim under Rule 12(b)(6) and the district court's decision regarding preemption." *Nathan*

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6. Alternatively, TANC asks us to transfer this case to the Court of Federal Claims. Although it is true that court has jurisdiction over non-tort suits against the BPA, *see* 28 U.S.C. §§ 1346(a)(2), 1491, that jurisdiction only exists where we lack exclusive jurisdiction under section 9(e)(5). *Public Utility District Number 1*, 855 F.2d at 650.

Kimmel, Inc. v. DowElanco, 275 F.3d 1199, 1203 (9th Cir. 2002) (citing *Williamson v. Gen. Dynamics Corp.*, 208 F.3d 1144, 1149 (9th Cir.), *cert. denied* 531 U.S. 929 (2000)).

Federal preemption of state law is rooted in the Supremacy Clause, Article VI, clause 2, of the United States Constitution. Preemption of state law "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977), *quoted in Branco v. UFCW-Northern Cal. Employers Joint Pension Plan*, 279 F.3d 1154, 1157 (9th Cir. 2002).

TANC asserts three categories of state law claims against the utility company defendants: (1) tort and property claims for inverse condemnation, nuisance, trespass, and conversion; (2) claims for breach of contract, intentional interference with a contractual relationship, and intentional interference with a prospective economic advantage; and (3) a fraud claim solely against Sierra Pacific. All of these claims are preempted by the Federal Power Act.

A

The conflict between federal law and TANC's state law tort and property claims is readily apparent. As the Supreme Court has explained, Part II of the Federal Power Act, codified at 16 U.S.C. §§ 824-824m, delegates to the Federal Energy Commission "*exclusive* authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce," *New England Power Co. v. New Hampshire*, 455 U.S. 331, 340 (1982) (emphasis added). Thus, as we have recently

explained, "FERC's exclusive jurisdiction extends over all facilities for such transmission or sale of electric energy." *Duke Energy Trading & Mktg., L.L.C. v. Davis*, 267 F.3d 1042, 1056 (9th Cir. 2001) (citing 16 U.S.C. § 824(b), (d)); *see also Ass'n of Pub. Agency Customers v. Bonneville Power Admin.*, 126 F.3d 1158, 1173 (9th Cir. 1997) ("Interstate transmission [of electricity] is clearly a federal matter.").

All of TANC's tort and property claims allege that the operation of the Alturas Intertie either damages, or trespasses on, the California-Oregon Transmission Project. FERC, however, approved the operation of the Alturas Intertie and its connection to the Northwest AC Intertie, thereby creating an interstate system for the transmission of electricity that stretches from Oregon through northern California and into Nevada. FERC alone has the authority to modify its decision pertaining to the Alturas Intertie, or to respond to challenges to the Intertie's operation. TANC cannot obtain state law money damages allegedly resulting from the operation of an interstate electricity intertie expressly approved by FERC, where the manner of operation was necessarily contemplated at the time of approval *Cf. Midwestern Gas Transmission Co. v. McCarty*, 270 F.3d 536, 539-40 (7th Cir. 2001) (holding that a state commission may not interfere with an interconnection of interstate gas transmission lines once that interconnection has been approved by FERC).[7]

Unable to cite any case involving the interstate transmission of electricity (or a like commodity) where state law tort or

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7. Decisions under the Natural Gas Act and Federal Power Act are interchangeable. *See Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981).

property claims challenging that transmission have been allowed to go forward notwithstanding federal approval of the transmission, TANC relies upon a string of airport cases where federal approval of flight plans did not preempt state law nuisance and noise violation claims. TANC then suggests the analogy that a homeowner would be equally free to file a state law nuisance claim regarding the operation of power lines, and that TANC is in a position akin to that of such a homeowner. This analogy relies upon a number of false premises, but we need only point out the most obvious one.

We may assume for the purpose of argument that a homeowner, in certain circumstances, might be able to pursue a state law tort or inverse condemnation claim challenging the operation of electricity transmission lines, in much the same way a homeowner might pursue a claim challenging airport noise. This does not mean, however, that TANC can do the same. TANC is not a homeowner. It is an operator of an interconnected, federally regulated, interstate transmission system. *See generally New York v. FERC*, __ U.S. __, 122 S. Ct. 1012, __, 2002 U.S. LEXIS 1380, at *11-15 (March 4, 2002) (describing the highly interconnected nature of the nation's electricity grids, including on the West Coast). Offering an analogy of our own, allowing TANC to sue under state law for damage allegedly caused to its transmission system by an interconnected interstate system approved by FERC would be akin to allowing an airline to sue under state law for damages caused to its operations by the operations of another airline's FAA-approved flight plans. Not surprisingly, no aviation case nor any other authority supports such a proposition.

More to the point, what TANC seeks to achieve by its tort and property claims would defeat the entire purpose of exclusive federal regulation of interstate transmission of electricity. FERC has approved the construction and operation of the Alturas Intertie, and FERC alone (subject to court review of its final decision) can modify that decision, or deal with any party who operates the Alturas Intertie improperly. We conclude that TANC's state law tort and property claims against the utility company defendants are preempted. We next consider TANC's contract-related claims against these defendants.

B

All of TANC's contract-related claims depend upon the assumption that, but for the misdeeds of the utility company defendants, FERC would have continued to allocate 4800 MW of electricity transmission capacity from the Northwest AC Intertie to the California-Oregon Intertie. This speculative assumption as to how FERC would have allocated electricity transmission capacity runs afoul of the filed rate doctrine.

At its most basic, the filed rate doctrine provides that state law, and some federal law (e.g. antitrust law), may not be used to invalidate a filed rate nor to assume a rate would be charged other than the rate adopted by the federal agency in question. *County of Stanislaus v. Pacific Gas & Elec. Co.*, 114 F.3d 858, 862-63 (9th Cir. 1997). The doctrine applies to rates charged by railroads, *see Keogh v. Chicago & Northwestern Ry. Co.*, 260 U.S. 156 (1922), natural gas companies, *see Arkansas Louisiana Gas Co. v. Hall*, 453 U.S.

571 (1981), and other interstate operators over whom federal agencies have exclusive power to set rates. More relevant here, the Supreme Court has extended the doctrine to the Federal Power Act and to electricity rates.

In *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 251 (1951), the Supreme Court held that a plaintiff in a case involving electricity rates set by the Federal Power Commission (the precursor to FERC) could "claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms." The Court has explained that this rule is without exception: "Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction. . . . This was done in the Power Act by making [Federal Power Commission] jurisdiction plenary and extending it to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States." *Fed. Power Comm'n v. Southern Cal. Edison Co.*, 376 U.S. 205, 215-16 (1964), *quoted in Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986).

As further developed, the filed rate doctrine has prohibited not just a state court (or a federal court applying state law) from setting a rate different from that chosen by FERC, but also from assuming a hypothetical rate different from that actually set by FERC. In *Arkansas Louisiana Gas Co.*, 453 U.S. at 579, the Court stated:

> It would undermine the congressional scheme of uniform regulation of rate regulation to allow a state court to award as damages a rate never filed with the Commission and thus never found to be reasonable within the meaning of the [Natural Gas] Act. Following that course would permit state courts to grant regulated sellers greater relief than they could obtain from the Commission itself.

The Court has also expanded the reach of the filed rate doctrine beyond just rates. In *Nantahala Power*, the Supreme Court held that "the filed rate doctrine is not limited to rates *per se*." 476 U.S. at 966. Instead, any allocation of power that directly affects rates is protected by the filed rate doctrine. *Id.* at 966-67. Thus, following *Nantahala Power*, we recognized that an allocation of natural gas approved by the Economic Regulatory Administration (ERA) is covered by the filed rate doctrine, just as if the allocation had been a decision on rates. *See County of Stanislaus*, 114 F.3d at 863-64 ("Plaintiffs' denial of access claims are, at core, a challenge to the quantity of gas that PG&E purchased from Canadian producers; because such quantities had received ERA approval and authorization, the claims cannot overcome the filed rate doctrine's clear instruction that ERA-approved volumes are conclusively reasonable.").

In *County of Stanislaus*, we noted that in *Nantahala* the Court had left open the possibility that a claim based on allocation might not be covered by the filed rate doctrine, if that allocation had not been set or approved by FERC or another federal agency. *County of Stanislaus*, 114 F.3d at 864. However, the reservation of this issue with regard to allocations

of interstate electricity transmission capacity is no longer appropriate because FERC's failure to address a specific allocation of electricity no longer invites the possibility that the filed rate doctrine might not apply. We reach this conclusion by giving deference to FERC Order No. 888, reported at 61 Fed. Reg. 21,540 (May 10, 1996).[8]

FERC Order No. 888 has functionally combined FERC regulation of rates with FERC regulation of transmission capacity. The Order accomplishes this because it regulates rates not by setting them directly, but rather by setting rules requiring open access to transmission lines at uniform, openly disclosed, rates. *See id.* at 21,541; *see also* 18 C.F.R. § 35.28 (implementing the nondiscriminatory open access transmission tariff policy). These open policies as to transmission capacity, FERC expects, will result in rates set at a competitive level. *See* 61 Fed. Reg. at 21,541. Thus, FERC's regulation of interstate rates now operates through FERC's regulation of open access to transmission capacity. For that reason, any right to a particular allocation of interstate transmission capacity must now be considered an exclusive matter of federal law. To conclude otherwise would restrict FERC's ability to regulate rates through its open transmission policy. We therefore hold that FERC's exclusive jurisdiction over the interstate transmission of electricity extends to any claims of entitlement

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8. In a case deciding several consolidated appeals, the D.C. Circuit upheld FERC Order No. 888; the Supreme Court granted certiorari on two issues not related to this appeal and issued an opinion affirming the D.C. Circuit and upholding FERC Order No. 888. *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000) (per curiam), *aff'd sub. nom. New York v. FERC*, __ U.S. __, 122 S. Ct. 1012, 2002 U.S. LEXIS 1380 (March 4, 2002).

to a specific allocation of interstate transmission capacity, whether that claim asks a court to enforce such an alleged entitlement or merely to hypothetically assume it.[9]

In the present case, the common theme in TANC's claims against the utility company defendants for breach of contract, intentional interference with a contractual relationship, and intentional interference with a prospective economic advantage is the contention that TANC is, or would have been, entitled to 4800 MW of transfer capability between the Northwest AC Intertie and the California-Oregon Intertie. This contention stumbles upon the filed rate doctrine.

For a district or state court to conclude that under state contract law the Northwest Parties breached the Agreements — or that Sierra Pacific interfered with the Agreements or the prospective economic advantage related to those Agreements — by failing to increase the capacity of the Northwest AC Intertie to 5100 MW, the court would have to hold that under state contract law TANC was entitled to 4800 MW of transfer

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9. We have grounded our decision in the filed rate doctrine, despite the existence of separate FERC authority over transmission capacity, because no court has yet determined whether the rule against courts assuming hypothetical allocations of transmission capacity would apply if the hypothetical allocations of transmission capacity did not affect FERC-controlled rates. We note, however, that as the Supreme Court has recently explained, FERC's jurisdiction of electricity transmission, unlike its jurisdiction over sales (i.e. rates), can reach *intrastate* transmissions. *New York v. FERC*, 2002 U.S. LEXIS 1380, at *26-27. Hence, we reserve for future resolution the question whether federal law preempts claims that assume a hypothetical allocation of intrastate transmission capacity, notwithstanding FERC's lack of authority over intrastate sales.

capacity. Yet, state law can no more assume how FERC would allocate access to interstate transmission capacity than it can assume how FERC would set rates. *Cf. Arkansas Louisiana Gas Co.*, 453 U.S. at 579. This is true given both FERC Order No. 888 and FERC's express approval of the operation of the Alturas Intertie, with knowledge that its connection to the Northwest AC Intertie could impair the California-Oregon Intertie and the California-Oregon Transmission Project. Although this resolution may leave TANC's state law claims unredressed, such a circumstance is not an unlikely result of preemption. *Cf. id.* at 584 ("A finding that federal law provides a shield for the challenged conduct will almost always leave the state law violation unredressed.").

This same analysis undercuts TANC's reliance on a Fifth Circuit case, *Gulf States Utilities Co. v. Alabama Power Co.*, 824 F.2d 1465 (5th Cir. 1987). There, the court held that claims regarding the quantity of electricity required under a contract were not preempted by the filed rate doctrine. *Id.* at 1472. However, in that case, the quantity to be purchased was not within the ambit of federal regulation. *Id.* In the present case, in light of FERC Order No. 888, the right to interstate transmission capacity access falls squarely within the area of exclusive federal regulation of rates.

We conclude that TANC's breach of contract and related claims against the utility company defendants are preempted by the Federal Power Act, 16 U.S.C. §§ 791-828c.

C

We turn now to TANC's fraud claim against Sierra Pacific. TANC alleges that Sierra Pacific committed the state law tort of intentional misrepresentation because Sierra Pacific:

> [O]btained governmental permits and authorizations to construct and operate the Alturas Intertie Project by representing to governmental agencies and interested parties, including plaintiff, that the purpose of the Alturas Intertie Project was to provide emergency support to Sierra Pacific and to enable Sierra Pacific to make occasional economy purchases and sales, but not to purchase power to increase capacity.

TANC does not specify in its complaint whether the alleged misrepresentations were made to FERC, the California Public Utilities Commission (PUC), or both. However, in its brief, TANC explains that "it believes the evidence is irrefutable that Sierra Pacific misrepresented its intentions regarding its use of the Alturas Intertie Project to the California Public Utilities Commission, and to those participants in the commission's proceedings." We therefore construe this claim as alleging misrepresentations in proceedings before the PUC.[10]

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10. If TANC's fraud claim were predicated on alleged misrepresentations before FERC, it would still be preempted based upon the reasoning that we apply *infra* to a claim alleging misrepresentations to the California PUC. We note that such a claim might also be preempted under *Buckman Co. v. Plaintiffs' Legal Commission*, 531 U.S. 341, 343-44 (2001) (holding that a state law fraud-on-the-Food and Drug Administration (FDA) claim is impliedly

(Cont'd)

If the alleged misrepresentations were made before the California PUC, then the predicate bad act occurred before a state agency, and federal law appears, at first glance, irrelevant. Yet, the problem with TANC's fraud claim remains the same as it is for its contract-related claims: TANC cannot prove damages without assuming that FERC would have allocated 4800 MW to the California-Oregon Intertie. Even assuming, without deciding, that the California PUC could have blocked construction of the Alturas Intertie, TANC's alleged "right" to 4800 MW, from which TANC derives its damages, violates the filed rate doctrine's prohibition on assuming hypothetical allocations of interstate transmission capacity.

We recognize that the Supreme Court has yet to resolve the issue of whether a claim based upon fraud before an agency can be preempted by the filed rate doctrine. *See Arkansas Louisiana Gas Co.*, 453 U.S. at 583 n.13. However, two circuits have concluded that filed rate preemption applies even where the claim is that a rate was procured by fraud. In a case where the fraud allegedly involved the state agency that approved the rate, the Eight Circuit held: "[T]he underlying conduct does not control whether the filed rate doctrine applies. Rather, the focus for determining whether the filed rate doctrine applies is the impact the court's decision will have on agency procedures and rate determinations." *H.J., Inc. v.*

(Cont'd)

preempted by statutory scheme granting FDA power to punish and deter fraud), and *Nathan Kimmel, Inc. v. DowElanco*, 275 F.3d 1199, 1204-07 (9th Cir. 2002) (holding that a state law claim that hinged upon the theory that the defendant made misrepresentations to the Environmental Protection Agency was preempted by a statutory scheme similar to that at issue in *Buckman*), but we need not decide that issue.

Northwestern Bell Tel. Co., 954 F.2d 485, 489 (8th Cir. 1992). Because in that case the plaintiffs' fraud claim required that damages be measured by comparing the rates actually approved with those that allegedly should have been approved absent fraud, the court held that the filed rate doctrine barred the fraud claim. *Id.* at 488-92. Similarly, sitting en banc, the Eleventh Circuit in *Taffet v. Southern Co.*, 967 F.2d 1483, 1494-95 (11th Cir. 1992), held that an allegation that a filed rate was procured by fraud did not preclude application of the filed rate doctrine. We find these cases persuasive.

The impact of any award of damages to TANC for Sierra Pacific's alleged misrepresentation would be to undermine FERC's ability to regulate rates through its open access transmission policy. Such an award of damages would necessarily assume that, but for Sierra Pacific's alleged fraud, FERC would have made a specific allocation of electricity to TANC. *Cf. H.J., Inc.*, 954 F.2d at 489.

We conclude that TANC's fraud claim is preempted by the filed rate doctrine. We do not suggest, however, that in every case where FERC and a state utility commission have both approved a defendant's electricity intertie, a plaintiff could not possibly demonstrate damages from fraud committed before the state utility commission without implicating the filed rate doctrine.[11] Here, however, TANC

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11. We note that the California law does not recognize a state law equivalent of the filed rate doctrine. *See Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 992-93 (9th Cir. 2000) (citing *Cellular Plus, Inc., v. Super. Ct.*, 14 Cal. App. 4th 1224 (1993)). Our decision, thus, is entirely based upon the effect of an award of damages on FERC's authority over interstate rates.

has failed to present a model of damages that does not impermissibly rely upon an assumption that FERC would have continued to allocate a certain amount of electricity transmission capacity to the California Oregon Intertie but for Sierra Pacific's misrepresentations.

IV

Conclusion

For the foregoing reasons, the district court's judgment is AFFIRMED.

Appendix A

ORDER

The opinion filed April 16, 2002 is amended as follows:

At slip opinion page 5765, in the first full paragraph, the fourth sentence that begins "TANC cannot obtain state law money damages . . . " is amended to read: "TANC cannot obtain state law money damages allegedly resulting from the operation of an interstate electricity intertie expressly approved by FERC, where the manner of operation was necessarily contemplated at the time of approval."

At slip opinion page 5766, in the first full paragraph, the fifth sentence that begins "Offering an analogy of our own . . . " is amended to read: "Offering an analogy of our own, allowing TANC to sue under state law for damage allegedly caused to its transmission system by an interconnected interstate system approved by FERC would be akin to allowing an airline to sue under state law for economic damages caused by another airline's FAA-approved flight plans."

With these amendments, the panel named above has voted to deny the petition for rehearing. Judges W. Fletcher and Berzon have voted to deny the petition for rehearing en banc, and Judge Thompson has recommended denial of that petition.

The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on that petition.

The petition for rehearing and petition for rehearing en banc are DENIED.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA DATED FEBRUARY 8, 2001 AND FILED FEBRUARY 9, 2001

NO. CIV. S-00-1081 WBS/DAD

TRANSMISSION AGENCY OF NORTHERN CALIFORNIA,

Plaintiff,

v.

SIERRA PACIFIC POWER COMPANY, BONNEVILLE POWER ADMINISTRATION, PACIFICORP, PORTLAND GENERAL ELECTRIC COMPANY, and DOES 1 THROUGH 100, inclusive,

Defendants.

MEMORANDUM AND ORDER

This is a suit involving an interconnection of transmission facilities that is allegedly reducing plaintiff's electricity supply. Defendants move to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(6), and 19(b).

I. *Factual and Procedural Background*

Plaintiff TANC is a California joint powers agency which provides electrical transmission facilities and services for

the use of its members.[1] Defendants Sierra Pacific Power Company ("Sierra Pacific"), PacifiCorp, and Portland General Electric Company ("Portland") are investor-owned public utility companies.

Defendant Bonneville is a federal power marketing agency of the United States Department of Energy. Pursuant to the Bonneville Project Act, 16 U.S.C. § 832, *et seq.*, Bonneville is responsible for marketing power from the Federal Columbia River power system to the Pacific Northwest. *See* 16 U.S.C. §§ 823, 839a(14). Bonneville's transmission lines comprise approximately 800 of the bulk transmission capacity in the Pacific Northwest.

Defendants Bonneville, PacifiCorp and Portland (collectively "Northwest parties") are joint-owners of the "Northwest Intertie," which is comprised of transmission facilities north of the California-Oregon border. The Northwest Intertie is connected to the California-Oregon Intertie ("COI"), which is comprised of plaintiff's transmission line, known as the California-Oregon Transmission Project ("Transmission Project line"), and two other lines, known as the "Pacific AC Intertie."[2]

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1. TANC's members include the cities of Alameda, Briggs; Gridley, Healdsburg, Lodi, Lompoc, Palo Alto, Redding, Roseville, Santa Clara (now Silicon Valley Power), and Ukiah. TANC also serves the Sacramento Municipal Utility District, the Modesto Irrigation District, the Turlock Irrigation District, and the Plumas-Sierra Rural Electric Cooperative.

2. TANC owns 79% of the Transmission Project, and is the designated "project manager."

The Pacific AC Intertie is owned by three California-based public utilities: Pacific Gas & Electric Co., Southern California Edison, and San Diego Gas & Electric.

Appendix B

In 1991, Plaintiff entered into a written interconnection agreement with the Northwest parties ("COI interconnection agreement"), which provided for 4800 megawatts ("MW") of transfer capability from the Northwest Intertie to the California-Oregon Intertie.[3] Of that amount, 1600 MW (one-third) was designated for the Transmission Project line, serving Plaintiff's members, while the remaining 3200 MW (two-thirds) was designated for the Pacific AC Intertie.[4]

In December 1998, the Northwest parties connected the Northwest Intertie with Sierra Pacific's California transmission facility at Hilltop Substation, creating the "Alturas Intertie."[5] The Alturas Intertie provides service to Nevada and has 300 MW of transfer capability. Approximately 100 MW of that capacity is provided for two rural electric cooperatives in Nevada that are customers of Bonneville.

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3. Two agreements are related to the interconnection of the Northwest Intertie with the California-Oregon Intertie: the initial "COI interconnection agreement" and the corresponding "COI scheduling agreement."

4. Prior to construction of the Transmission project, the capacity of the Pacific AC Intertie was 3200 MW. When the project was built, the overall transfer capability of the entire transmission grid was increased by 1600 MW so that there would be no decrease in the transfer capability of the Pacific AC Intertie. The added capacity was the result of the Northwest Reinforcement Project, an enterprise led by Bonneville and PacifiCorp.

5. Two agreements between the Northwest parties and Sierra Pacific are related to the creation and operation of the Alturas Intertie: the initial "Alturas interconnection agreement" and the corresponding "Alturas scheduling agreement."

Appendix B

Plaintiff claims that the Alturas Intertie interferes with the transmission of power through the California-Oregon Intertie, and has reduced TANC's ability to receive its share of energy through the Transmission Project line.[6]

Plaintiff has filed a protest with the Federal Energy Regulatory Commission ("FERC"), which initially approved the Alturas Intertie by order dated November 30, 1998. Final briefs regarding plaintiff's protest were filed in September 2000, and FERC has yet to rule on the matter.[7]

Plaintiff filed this action on March 31, 2000, in California Superior Court, County of Sacramento, and defendants removed the action to this court. The first amended complaint alleges inverse condemnation, trespass, private nuisance, and conversion against all defendants; intentional misrepresentation and interference with contractual relations and prospective economic advantage against Sierra Pacific; and breach of contract against Bonneville, PacifiCorp, and Portland.

Defendant Bonneville, joined by Portland, moves to dismiss for lack of subject matter jurisdiction pursuant to

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6. The parties agree that when power is delivered from the Northwest Intertie to the Alturas Intertie, the amount of power that can be delivered to the California-Oregon Intertie is reduced by the amount delivered to the Alturas Intertie. Thus, if the Alturas Intertie is operated at its full transmission capacity of 300 MW, the California-Oregon Intertie can only simultaneously receive up to 4500 MW, 300 MW less than its 4800 MW transfer capability.

7. During oral argument on February 5, 2001, counsel for Bonneville stated that he expects a ruling "in early spring."

Rule 12(b)(1). Bonneville argues in the alternative that plaintiff's tort claims are barred under the Federal Tort Claims Act, 28 U.S.C. § 2671, *et seq.*, because Plaintiff did not provide proper notice pursuant to 28 U.S.C. §2675(a).[8] During oral argument on February 5, 2001, plaintiff stated that it does not oppose dismissal of its tort claims on this ground. Thus, plaintiff's breach of contract claim is the only remaining claim for consideration against Bonneville.

Defendant Sierra Pacific, also joined by Portland, moves to dismiss on the grounds that plaintiff's claims are preempted by federal law, plaintiff cannot join an indispensable party, and the complaint fails to state a claim upon which relief can be granted. Fed: R. Civ. P. 12(b)(1), 19(b), & 12(b)(6).

II. *Bonneville's Motion to Dismiss*

Bonneville argues that under the Pacific Northwest Electric Power Planning and Conservation Act ("Northwest Power Act"), 16 U.S.C. § 839, *et seq.*, the United States Court of Appeals for the Ninth Circuit has exclusive jurisdiction over plaintiff's claims against Bonneville.

The Ninth Circuit has held, pursuant to 16 U.S.C. § 839f(5), that it has original jurisdiction over suits challenging "final actions or other decisions by BPA [Bonneville Power Authority]

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8. Bonneville initially raised another alternative argument that under the Tucker Act, 28 U.S.C. § 1491(a)(1), the Federal Claims Court has exclusive jurisdiction over plaintiff's breach of contract and inverse condemnation claims. However, Bonneville withdrew this argument in its reply brief.

. . . taken pursuant to tile Act's statutory authority."[9] *Pacific Power and Light Co. v. Bonneville Power Administration*, 795 F.2d. 810, 814 (9th Cir. 1986); 16 U.S.C. § 839f(5). The Act permits district court jurisdiction "only over 'other actions' which do not lie within [the Ninth Circuit's] exclusive jurisdiction." Pacific Power and Light, 795 F.2d at 814. "[T]he district court has no jurisdiction over challenges to BPA . . . actions under the Act." *Id.*

The Ninth Circuit's jurisdiction "does not turn on the legal theory underlying the lawsuit," but rather "the nature of the agency action at issue." *Central Montana Electric Power Cooperative, Inc. v. Administrator of the Bonneville Power Administration*, 840 F.2d 1472, 1476 (9th Cir. 1988). "The proper inquiry focuses on the agency being attacked and whether the factual basis for that attack is an agency action authorized by the Act." *Pacific Power and Light*, 795 F.2d at 816. Thus, the Ninth Circuit has exclusive jurisdiction here if the effect of TANC's action is to challenge a final action or decision by Bonneville pursuant to its statutory authority. *See id.* at 815 ("effect of [the plaintiff's] action would be to challenge BPA's ratemaking proceedings"); *Central Montana*, 840 F.2d at 1476 ("effect of [the plaintiff's] action is to challenge the BPA's power-marketing decision").

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9. Section 839f(5) provides that suits challenging "final actions and decisions taken pursuant to this chapter by the Administrator or the Council, or the implementation of such final actions, whether brought pursuant to this chapter, the Bonneville Project Act[,] . . . or the Federal Columbia River Transmission System Act [,] . . . shall be filed in the United States District Court of Appeals for the region." 16 U.S.C. § 839f(5).

Appendix B

A. *Bonneville's Statutory Authority*

Bonneville argues that its participation in the Alturas Intertie is a final action or decision pursuant to the agency's statutory authority under the Bonneville Project Act, 16 U.S.C. §§ 832-832m, the Regional Preference Act, 16 U.S.C. §§ 837-837h, the Federal Columbia River Transmission System Act ("Transmission System Act"), 16 U.S.C. §§ 16 U.S.C. 838-838k, and the Northwest Power Act, 16 U.S.C. § 839, *et seq.*

The court accords substantial deference to Bonneville's interpretation of the statutes because it is the agency charged with their administration. *See* 16 U.S.C. § 832a(a)&(b); *Central Montana*, 840 F.2d at 1476; *Chevron U.S.A., Inc. v. Natural Resources Defense*, 467 U.S. 837, 844 (1984) ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer. . . ."). The court need only conclude that Bonneville's interpretation of the statutes is reasonable. *See Central Montana*, 840 F.2d at 1477 (quoting *American Paper Inst., Inc. v. American Electric Power Serv. Corp.*, 461 U.S. 402, 422-23 (1983)).

The Bonneville Project Act provides for the distribution of electric energy generated by the "Bonneville Project," which is a federal hydro-electric power facility on the Columbia River.[10] The Act authorizes the Bonneville "Administrator," who is appointed by the Secretary of Energy, to "enter into

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10. The Bonneville Project includes the "dam, locks, power plant, and appurtenant works under construction on August 20, 1937." 16 U.S.C. § 832.

such contracts, agreements, and arrangements . . . in such a manner as [she] may deem necessary." 16 U.S.C. § 832a(f). The Act also authorizes and directs the Administrator

> to provide, construct, operate, maintain, and improve such electric transmission lines and substations, and facilities and structures appurtenant thereto, as [she] finds necessary, desirable, or appropriate for the purpose of transmitting electric energy, available for sale, from the Bonneville project to existing and potential markets, and, for the purpose of interchange of electric energy, to interconnect the Bonneville project with other Federal projects and publicly owned power systems constructed on or after August 20, 1937.

16 U.S.C. § 832a(b). Thus, the plain language of the Bonneville Project Act directs the Administrator to "provide, construct, operate, maintain, and improve" transmission lines for the purpose of transmitting available electric energy from the Bonneville project to "existing and potential markets." According to Bonneville, approximately 100 MW of the capacity in the Alturas Intertie is provided for existing Bonneville customers in Nevada. Bonneville also states that another purpose of the interconnection is to provide access to new markets for Bonneville's surplus power. Thus, Bonneville's interconnection with Sierra Pacific is pursuant to its authority under the Bonneville Project Act.

The Transmission System Act authorizes the construction of additions to the Federal transmission system within the Pacific Northwest region for the purpose of providing

"interregional transmission facilities." *See* 16 U.S.C. § 838b ("[T]he Administrator shall . . . construct additions to [the Federal transmission system] within the Pacific Northwest as [she] determines are appropriate and required to . . . provide interregional transmission facilities. . . .").[11] The definition

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11. Section 838b provides:

> [T]he Administrator shall operate and maintain the Federal transmission system within the Pacific Northwest and shall construct improvements, betterments, and additions to and replacements of such system within the Pacific Northwest as [she] determines are appropriate and required to:
>
> (a) integrate and transmit the electric power from existing or additional Federal or non-Federal generating units'
>
> (b) provide service to the Administrator's customers;
>
> (c) provide interregional transmission facilities; or
>
> (d) maintain electrical stability and electrical reliability of the Federal system. . . .

16.U.S.C. § 838b. The Administrator may construct "customer service" facilities outside the Pacific Northwest, within contiguous areas that are (1) not in excess of seventy-five airline miles from the Pacific Northwest region, and (2) are served by a distribution cooperative that has no generating facilities, and serves areas both within and without the Pacific Northwest region. *Id.*

of the "Pacific Northwest" is found in the Northwest Power Act Pursuant to 16 U.S.C. § 839a(14), the "Pacific Northwest" means:

> (A) the area consisting of the States of Oregon, Washington, and Idaho, the portion of the State of Montana west of the Continental Divide, and such portions of Nevada, Utah and Wyoming as are within the Columbia River drainage basin; and (B) any contiguous areas, not in excess of seventy-five air miles from the area referred to in subparagraph (A), which are a part of the service area of a rural electric cooperative customer served by the Administrator on December 5, 1980 which has a distribution system from which it serves both within and without such region.

16 U.S.C. § 839a(14).

A map provided by Bonneville indicates that the agency constructed a transmission line from the Malin substation in Oregon to the Hilltop substation in California. The definition of the Pacific Northwest region does not include the state of California. However, the map shows that the Malin-Hilltop line is within seventy-five airline miles from the California-Oregon border.[12] Thus, Bonneville's interpretation that the Act authorizes the construction of a federal transmission line from Malin to the Hilltop substation is reasonable.

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12. According to Bonneville' s map, Alturas is approximately 35 airline miles from the California-Oregon border.

Moreover, section 839f(i)(3) of the Northwest Power Act mandates that the Administrator "shall furnish services including transmission . . . unless [she] determines such services cannot be furnished without substantial interference with . . . existing contractual obligations." 16 U.S.C. § 839f(i)(3). This provision speaks directly to Bonneville's obligation to provide transmission services in a manner consistent with existing contractual obligations.

Finally, Bonneville points to provisions requiring the agency to "make available to all utilities on a fair and non-discriminatory basis, any capacity in the Federal transmission system which [she] determines to be in excess of the capacity required to transmit electric power generated or acquired by the United States." 16 U.S.C. § 838d. The Regional Preference Act further provides:

> Any capacity in Federal Transmission lines connecting, either by themselves or with non-Federal lines, a generating plant in the Pacific Northwest or Canada with the other area or *with any other area outside the Pacific Northwest,* which is not required for the transmission of Federal energy . . . *shall be made* available as a carrier for transmission of other electric energy between such areas.

16 U.S.C. § 837e.

In sum, the Bonneville Project Act, the Regional Preference Act, the Transmission System Act, and the Northwest Power Act all appear to authorize Bonneville's interconnection with Sierra Pacific and the creation of the

Alturas Intertie. Accordingly, Bonneville's interpretation of the relevant statutory provisions is reasonable and thus entitled to deference by the court.

B. *TANC's Challenge*

The Ninth Circuit has exclusive jurisdiction over TANC's claims against Bonneville if the claims effectively challenge Bonneville's participation in the Alturas Intertie. TANC has one remaining claim against Bonneville for breach of contract. TANC declares it is not claiming that Bonneville's participation in the Alturas Intertie is illegal or unauthorized. Rather, TANC's "primary concern" is Bonneville's alleged breach of the COI interconnection and scheduling agreements, and the resulting damage to TANC's property through interference with the operation of TANC's Transmission Project line. According to TANC, "[a] party to a contract who voluntarily takes affirmative and intentional action knowing that action will render that party incapable of performing under the contract is in breach whether or not the action was legal, proper, authorized or approved." (Opp'n to Bonneville's Motion at 5:14-17).

The plaintiffs in *Pacific Power* made a similar argument. *See Pacific Power*, 795 F.2d at 815. In that case, the Ninth Circuit upheld the district court's dismissal of the plaintiffs' breach of contract claim against Bonneville for lack of jurisdiction. *Id.* at 816. The plaintiff utility companies claimed that when Bonneville adopted a new cost methodology, it breached an agreement with the plaintiffs wherein Bonneville promised not to change its existing cost methodology for one year. *See id.* at 812-13. The plaintiffs argued that the district court had

jurisdiction because "the cause of action [was] grounded in contract law, not BPA's statutory authority under the Act." *Id.* at 815.

The district court, however, found that the contract issues were "interwoven" with Bonneville's consideration and approval of the new cost methodology. *See id.* at 813. Thus, the district court held its exercise of jurisdiction would necessarily impact the course of Bonneville's authority to adopt the new cost methodology. *Id.* The Ninth Circuit agreed, stating "[i]t is clear . . . that [section 839f(e)(5)] does not permit district court jurisdiction where the effect of an action is to challenge a BPA proceeding. . . . " *Id.* at 815. "Although the utilities' action [was] based upon their contracts with BPA, the effect of their action would be to challenge BPA's . . . obligation to undertake ratemaking in a manner consistent with contractual commitments." *Id.* at 815-16. ("What is crucial here is that the utilities are alleging that BPA's exercise of its authority under § 839c(c) to establish and average cost methodology is in breach of the agency's contractual obligations.").

Similarly, plaintiff here alleges that as a result of Bonneville's exercise of its authority to participate in the Alturas Intertie, Bonneville is in breach of a contractual obligation to maintain 4800 MW of transfer capability between the Northwest Intertie and the California-Oregon Intertie. Thus, plaintiff's claim, which is based on Bonneville's obligation to maintain 4800 MW of transfer capability, is interwoven with Bonneville's decision to interconnect with Sierra Pacific and provide transmission service through the Alturas Intertie.

Appendix B

Plaintiff relies on *Pub. Util. Dist. of Clark County v. Johnson*, 855 F.2d 647 (9th Cir. 1988), in which the Ninth Circuit held that it did not have jurisdiction over "claims involving alleged "contractual breaches by [Bonneville] and based on allegations of facts outside an administrative record." *Clark County*, 855 F.2d at 650.

In *Clark County*, the plaintiff alleged that Bonneville breached an oral or implied in fact contract, in which Bonneville agreed to purchase power from a particular facility. Plaintiff sued Bonneville after the agency issued an administrative decision stating that it would not purchase power from that facility. The Ninth Circuit reasoned that because the plaintiff's allegations were based on facts outside the scope of an administrative record, the [appellate] court was "particularly ill-equipped to hear" the plaintiff's claims. *See id.* at 649-50 ("[S]ection 839f(e)(1) expressly limits our review of final actions and decisions to the administrative record and incorporates the scope of review provision of the Administrative Procedure Act, 5 U.S.C. § 706.").

The present case is distinguishable from *Clark County*. Defendant notes that in deciding to execute the interconnection agreement with Sierra Pacific, Bonneville prepared a Record of Decision in accordance with various controlling regulations under the National Environmental Policy Act, and published the decision in the Federal Register. 61 Fed. Reg. at 7095 (1996). Thus, the action that forms the basis of the alleged breach is an agency decision supported by an Administrative Record.

The nature of the agency action challenged by plaintiff is Bonneville's operation of the Alturas Intertie. Bonneville's

construction of transmission facilities and the provision of transmission services is controlled by the agency's governing statutes. Because the issue of Bonneville's liability is interwoven with the agency's interconnection with Sierra Pacific and the operation of the Alturas Intertie, the exercise of jurisdiction by this court would necessarily impact Bonneville's authority to enter into such interconnection agreements. Even if jurisdiction is questionable, the Ninth Circuit "has consistently interpreted [section 839f(e)(5)] with a broad view of [the Ninth Circuit's] jurisdiction and a narrow definition of district court jurisdiction." *Id.* Accordingly, this court is without jurisdiction to hear plaintiff's claim against Bonneville for breach of contract.

Pursuant to 28 U.S.C. § 1631, the court may transfer plaintiff's case to the Ninth Circuit in lieu of dismissal. *See Bowers v. Jura*, 749 F. Supp. 1049, 1051 (W.D. Washington 1990). The interests of justice are better served here by dismissal. Plaintiff admits that its tort claims are defective in light of Plaintiff's failure to exhaust administrative remedies pursuant to the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.* Dismissal would afford plaintiff the opportunity to reconsider how its pleadings should be framed in a different forum. Further, this court will not suggest how the Ninth Circuit should proceed by transferring plaintiff's action to that court.

III. *Sierra Pacific's Motion to Dismiss*

Sierra Pacific moves to dismiss on the ground that all of TANC's claims are preempted by the Federal Power Act of 1935 ("FPA"), 16 U.S.C. § 791a *et seq.*, and regulations issued in 1996 by the Federal Energy Regulatory Commission ("FERC").

Appendix B

Section 824 of the FPA provides for federal regulation of the transmission and sale of electric energy in interstate commerce. Subdivision (a) of section 824 declares that "the business of *transmitting and selling* electric energy for ultimate distribution to the public is affected with a public interest." 16 U.S.C. § 824(a) (emphasis added). Subdivision (b) sets forth the boundaries of federal regulation as follows:

> The [Federal Energy Regulatory] Commission shall have jurisdiction over all facilities for such *transmission or sale* of electric energy, but shall not have jurisdiction, except as specifically provided [in the statute] over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.(Emphasis added.)

16 U.S.C. § 824(b)(1).[13]

Although. the quoted language from section 824(a) is worded in the conjunctive, the Second Circuit has held that the disjunctive language in section 824(b)(1) authorizes FERC to regulate the interstate transmission of electric energy, apart from sales of such power. *See Hartford Electric*

13. In 1992, Congress enacted the Energy Policy Act, which amended the FPA to authorize FERC to order utilities to "wheel" power, i.e. provide transmission service for wholesale power sellers over the utilities transmission lines on a case-by-case basis. *See* 16 U.S.C. §§ 824j-k.

Light Co. v. Federal Power Commission,[14] 131 F.2d 953, 965 (2d Cir. 1942), *cert. denied*, 319 U.S. 741 (1943) (explaining that exempting a corporation engaged in transmitting, but not selling, power would relieve it from both state and federal regulation, "a result which the legislative history shows to be in flat contradiction of the legislative purpose").

In April 1996, FERC issued Order 888, which was intended to increase competition among power suppliers and lower energy costs by requiring owners of transmission lines to open access to those lines. *See Transmission Access Policy Study Group v. Federal Energy Regulatory Commission*, 225 F.3d 667, 681-82 (D.C. Cir. 2000)(upholding Order 888 by determining, among other things, that its open access requirement does not unduly discriminate against existing utilities). The Order mandates what FERC calls "functional unbundling," i.e. the separation of utilities' wholesale transmission functions from their wholesale merchant functions. *Id.* at 682. Among other provisions, the Order requires all public utilities that own or operate facilities used for transmitting electric energy in interstate commerce to: (1) file an "Open Access Transmission Tariff" (or "OATT") that contains minimum terms and conditions for non-discriminatory services; (2) take transmission service for their own new wholesale sales and purchases of electric energy under the same terms and conditions as they offer to others; and (3) develop and maintain an "Open Access Same-Time Information System" ("OASIS") to give existing and potential transmission users the same access to transmission

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14. The Federal Power Commission, was the predecessor to the Federal Energy Regulatory Commission.

information as the utility itself. *See* Order 888, FERC Stats. & Regs. ¶ 31,036 at 31,635-36; (Def.'s Ex. B, Attached to Porter Decl.).

Sierra Pacific argues that, because FERC approved the Alturas Intertie in 1998, TANC's state law claims regarding that project are preempted by FERC's approval. Sierra-Pacific further contends that the underlying issues in this case already have been raised by TANC in its ongoing protests filed with FERC, and that TANC may not circumvent the federal regulatory process by repackaging its grievances as state tort and contract claims.

TANC argues that its lawsuit does not challenge FERC's approval of the Alturas Intertie, nor does it seek any ruling regarding the interconnection of transmission facilities or the sale of power.[15] Instead, TANC argues that it seeks only money damages, which FERC has no authority to award.

The preemption doctrine, which has its roots in the Supremacy Clause, U.S. Const., Art. VI, cl. 2, holds that certain matters are of such national character that federal laws preempt or take precedence over state laws. *See Fidelity Federal Savings and Loan Ass'n. v. de la Cuesta*, 458 U.S. 141, 152 (1982). Congress may preempt state laws either expressly or by implication. *Id.* Implied preemption occurs when the scheme of federal regulation occupies the field or

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15. In its opposition to Sierra Pacific's motion, TANC dropped its claim for injunctive relief.

when state law would be inconsistent with federal law. *Id.* at 152-53. "Even where Congress has not entirely displaced state regulation in a specific area, state law is preempted to the extent that it actually conflicts with federal law. Such a conflict arises when compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Pacific Gas and Electric Co. v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190, 204 (1983) (internal citations omitted). Federal regulations have the same preemptive effect as federal statutes. *Fidelity Federal Savings and Loan Ass'n*, 458 U.S. at 153.

Distilling the array of plaintiff's claims to their common core, TANC's grievance is that, since the Alturas Intertie was energized, it has lost first-priority access to all of the 1600 MW that had previously been available to it. According to TANC, it has pre-existing rights to this total capacity by virtue of its 1991 interconnection agreement with the Northwest parties.[16]

TANC, along with other California utilities, raised these same contentions in protests filed with FERC opposing the Alturas Intertie project. *See* 85 FERC 161,314 (1998), 1998 WL 822131; (Def.'s Ex. G, Attached to Porter Decl.). TANC's protest requested that FERC reject the Alturas Intertie agreement pending Congressional approval, the expansion of transfer capability of the Northwest Intertie, or the development of operating procedures to protect existing

16. These claims remain at the heart of TANC's complaint even though TANC states that it has dropped its request for injunctive relief.

systems that depend on the Northwest Intertie. 1998 WL 822131 at *3. FERC rejected TANC's request, noting that the Western Systems Coordinating Council ("WSCC"), which approved the 300 MW rating for the Alturas Intertie, had also established a task force to review the "operational impacts" of the project and resolve conflicting demands on the system. *Id.* at *4. FERC also emphasized that the commission has a procedure whereby a utility can seek relief from any burdensome "unauthorized loop flows." *Id.*[17]

TANC expanded on its initial arguments in a second protest, which asked FERC to suspend the agreements establishing the Alturas Intertie. *See* 86 FERC ¶ 61,198 (1999), 1999 WL 110058; (Def.'s Ex. J, Attached to Porter

17. The grievance procedure was established by Section 206(a) of the Federal Power Act. That section provides:

> Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice or contract to be thereafter observed and in force, and shall fix the same by order.

16 U.S.C. § 824e(a). The District of Columbia Circuit Court cited this provision in holding that Order 888 was not unduly discriminatory. *See Transmission Access Policy Study Group*, 225 F.3a at 689.

Decl.). Specifically, TANC claimed that Sierra Pacific would become the beneficiary of a 300 MW "windfall" through the Alturas Intertie by "siphoning off" capacity that had been previously dedicated to California customers. 1999 WL 110058 at *5. TANC also contended that Sierra Pacific was using the open-access mandate of Order 888 as a shield to avoid an order by FERC specifying the rights of access for parties to the Transmission Project line. *Id.* TANC further argued that Sierra Pacific was seeking a "free ride" from those entities that upgraded the Northwest Intertie to ensure adequate import capability into California. *Id.*

In its order, FERC noted that none of the pleadings filed by TANC indicated that TANC had requested, and been denied, firm transmission service on the Northwest AC Intertie.[18] Further, according to FERC, "no party, including Bonneville, has indicated whether transmission capacity is available on the Northwest AC Intertie for use on a firm basis by the California Utilities." *Id.* at *13. However, FERC acknowledged that the California Independent System Operator ("ISO") had expressed concern that the proposed Alturas scheduling agreement lacked sufficient detail on "scheduling and curtailment procedures" and did not reflect any agreement among the affected parties. *Id.* Thus, the commission ordered a hearing to review the proposed Scheduling Agreement. *Id.* The commission also urged the parties to go before a settlement judge to resolve their differences, concluding:

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18. "Firm" transmission service entitles the recipient to priority access in exchange for the payment of a premium.

Appendix B

> In light of the approach we have taken in this case, we will deny the requests of the parties to summarily determine whether the California Utilities' prior usages of the COI [California-Oregon Intertie] and/or the Northwest AC Intertie create some form of entitlement to upstream transfer capability, and whether those entitlements, should they exist, are adversely impacted by the Scheduling and Interconnection Agreements. The parties may address these issues before the settlement judge and, if necessary, may present evidence thereon at the hearing.

Id. at *14.

According to portions of the administrative record provided to this court, a hearing on this matter was held before an administrative law judge, the parties have filed post-hearing briefs, and a decision is pending. (*See* Def.'s Exs. 9 & 10, Attached to Supplemental Request for Judicial Notice.). Because FERC is in the process of adjudicating the same basic issues raised by TANC in this action, the application of state law here would interfere with an ongoing regulatory process. The determination of plaintiff's claims concerning the alleged reduced capacity in the Transmission Project line could impose an "obstacle to the accomplishment and execution" of the interconnection and scheduling agreements currently under review by FERC. Plaintiff's claims are accordingly preempted by FERC's regulation of interstate transmission of electricity under the Federal Power Act, 16 U.S.C. § 824(b)(1).

Appendix B

To support its arguments against preemption, TANC relies heavily on *Gulf States Utilities Co. v. Alabama Power Co.*, 824 F.2d 1465 (5th Cir. 1987). In that case, the Fifth Circuit Court of Appeals held that a utility could assert state law claims against a seller for alleged harmed caused by contracts requiring it to purchase a certain amount of power.[19] *Id.* at 1471. The court recognized that any state law claims concerning rates were barred by the "filed rate doctrine," which prevents buyers or sellers of electricity from suing over rates filed with FERC. *Id.* at 1470. However, the court found that the plaintiff's claims were not preempted because setting aside a contract requiring minimum purchases of electricity would not necessarily interfere with FERC's rate-making powers under the FPA. *Id.* at 1472. Based on the court's reasoning in *Gulf States*, TANC argues that its state law claims are not preempted by the FPA or FERC because this action involves the capacity of transmission lines, not rates. Thus, according to TANC, the determination of plaintiff's claims does not interfere with FERC's regulatory authority.

TANC's argument based on *Gulf States* rests on the premise that preemption only occurs under the FPA and FERC's regulatory authority if a plaintiff's claims implicate rates. TANC's argument ignores the purpose of preemption. The pertinent question is not whether this action implicates FERC's rate-making powers, but rather, whether TANC's claims implicate any of FERC's regulatory powers under the FPA. Under the FPA, FERC regulates not only the sale of

19. Plaintiff claimed that the purchase requirements overloaded its transmission capacity, referred to as the "stuffing" of transmission lines.

electrical power, but also the interstate transmission of energy. Thus, unlike the plaintiff's claims in *Gulf States*, the determination of TANC's claims would interfere with FERC's regulatory authority.

Moreover, in *Gulf States*, the parties did not petition FERC for the resolution of their dispute. In the instant case, FERC has investigated plaintiff's concerns regarding reduced transfer capability as a result of the Alturas Intertie, and FERC's resolution of plaintiff's protest is still pending.

In addition, FERC has issued Order 888, which mandates open access to interstate power lines. As a result, Order 888 preemptsstate law claims based on diminished access to interstate transmission lines. No such concerns were present in the contract at issue in *Gulf States*.

In *County of Stanislaus v. Pacific Gas and Electric Co.*, 114 F.3d 858 (9th Cir. 1997), the Ninth Circuit considered claims that a utility's act of "stuffing" a pipeline with power for its so-called "core customers" violated antitrust laws by preventing a "non-core customer" from accessing the line. *See id.* at 860. The Ninth Circuit held that all federal and state antitrust claims raised by the County were preempted by FERC's approval of the purchase agreement which led to the alleged "stuffing" of the line. *Id.* at 864-66.[20]

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20. The Ninth Circuit relied in part on *Nantahala Power and Light Company v. Thornburg*, 476 U.S. 953 (1986). In that case, the Supreme Court held that the filed-rate doctrine is not limited to FERC decisions on rates "per se," but also to decisions that could indirectly affect rates by determining the amount of power that a utility may obtain. *Id.* at 966-67.

Here, TANC also contends that its access to energy has been thwarted-not by "stuffing," but by the diversion of 300 MW of transfer capability through the Alturas Intertie. Because the agreements establishing the Alturas Intertie are subject to approval by FERC, plaintiff's claims are preempted for the same reason that the County's claims were preempted in *County of Stanislaus*.

In sum, the court finds that all of TANC's claims are preempted by the Federal Power Act and the regulations issued pursuant to the Act by FERC. Accordingly, the court need not address Sierra Pacific's alternative grounds for dismissal.

IT IS THEREFORE ORDERED that defendants' motions to dismiss be, and the same hereby are, GRANTED.

DATED: February 8, 2001

s/ William B. Shubb
WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE